

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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JAN 24 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0091
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
SCOTT MICHAEL MAILLOUX,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20084401

Honorable Richard S. Fields, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Nicholas Klingerman

Tucson
Attorneys for Appellee

West & Zickerman, PLLC
By Anne Elsberry

Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 Following a jury trial,¹ appellant Scott Mailloux was convicted of theft of a means of transportation. After finding Mailloux had two prior felony convictions, the trial court sentenced him to a substantially mitigated 7.5-year prison term. On appeal, Mailloux contends the court erred in refusing his request to be sentenced to unlawful use of a means of transportation, a class five felony, rather than theft of a means of transportation, a class three felony. For the reasons stated below, we affirm.

¶2 The evidence, viewed in the light most favorable to sustaining the verdict, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), established that in November 2008, Mailloux was found near a vehicle that had been reported stolen. When interviewed by a deputy sheriff, Mailloux admitted he had driven the car earlier that day, the ignition key did not go all the way in the ignition, he had observed someone remove the Arizona license plate from the car and replace it with the plate from another state, and he had a “pretty good feeling” the car was stolen. Mailloux acknowledged to the deputy that he had deprived the owner of the vehicle of its use. Although Mailloux and others present claimed the vehicle belonged to “Dave,” they could not provide any information about that individual.

¶3 Mailloux requested a jury instruction on unlawful use of a means of transportation as a lesser-included offense of theft of a means of transportation, the offense with which he was charged. The trial court gave the requested instruction, but the

¹This trial took place after Mailloux’s motion for new trial was granted following his first trial.

jury found Mailloux guilty of the greater offense. At sentencing, Mailloux argued that, because the charged offense and the lesser-included offense describe the same conduct, the rule of lenity requires he be sentenced under the lesser offense. The court rejected Mailloux's request, stating it was unaware of any authority that permitted it to sentence him for the lesser-included offense when "[t]he jury had the option of" finding him guilty of the lesser, rather than the greater offense "and they didn't."

¶4 Notably, Mailloux does not expressly assert that unlawful use of a means of transportation is not a lesser-included offense of theft of a means of transportation. Nor does he argue the trial court improvidently granted his request that the jury be given the lesser-included offense instruction. Rather, he renews his assertion that, because the two offenses "describe the same conduct but have different penalties," the rule of lenity requires he be sentenced for the lesser offense of unlawful use. To the extent this appeal presents a question of statutory interpretation, we review it de novo. *State v. Ontiveros*, 206 Ariz. 539, ¶ 8, 81 P.3d 330, 332 (App. 2003). Where the plain language of the statute is clear, we will not look beyond that language to understand the statute's meaning. *See State v. Garcia*, 219 Ariz. 104, ¶ 6, 193 P.3d 798, 800 (App. 2008).

¶5 A lesser-included offense is one "composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one." *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983). In this case, Mailloux was charged with theft of means of transportation in violation of A.R.S. § 13-1814(A)(5). That offense is committed when, "without lawful

authority, [a] person knowingly . . . [c]ontrols another person's means of transportation knowing or having reason to know that the property is stolen.” § 13-1814(A)(5). Mailloux requested an instruction for the lesser-included offense of unlawful use of means of transportation, which is committed in violation of A.R.S. § 13-1803(A)(1) when, “without intent permanently to deprive, [a] person . . . [k]nowingly takes unauthorized control over another person's means of transportation.”

¶6 In *State v. Kamai*, 184 Ariz. 620, 622, 911 P.2d 626, 628 (App. 1995), the court held unlawful use of means of transportation is a lesser-included offense of theft of property under A.R.S. § 13-1802(A)(1).² The court explained, “[t]he phrase ‘without intent to permanently deprive’ in the unlawful[-]use statute does not describe an element of the crime which the state must prove,” but “is simply included in the statute to distinguish unlawful use from auto theft.” *Kamai*, 184 Ariz. at 622, 911 P.2d at 628, quoting § 13-1803(A). Cf. *State v. Griest*, 196 Ariz. 213, ¶¶ 4-5, 994 P.2d 1028, 1029 (App. 2000) (finding person cannot commit theft by conversion under § 13-1802(A)(2) without committing joyriding or unlawful use and concluding joyriding is lesser-included offense of theft by conversion). The essential difference between the two statutes is that theft of means of transportation requires knowing or having reason to know that the property is stolen, while unlawful use only requires knowledge that the use of the property is not authorized. It follows that if a person knew the property was stolen he

²Section 13-1802(A)(1) is similar to § 13-1814(A)(1), the automobile theft statute, enacted in 1998 as A.R.S. § 13-1813, 1998 Ariz. Sess. Laws, ch. 119, § 3, and renumbered as § 13-1814 pursuant to A.R.S. § 41-1304.02.

would necessarily know the use was unauthorized, although the opposite is not necessarily true. Thus, unlawful use is a lesser-included offense of theft of means of transportation, and, contrary to Mailloux's claims, the two offenses cannot be identical.

¶7 Additionally, as Mailloux concedes, the rule of lenity applies only when statutes are “susceptible to more than one interpretation.” *State v. Tarango*, 185 Ariz. 208, 210, 914 P.2d 1300, 1302 (1996), *quoting State v. Pena*, 140 Ariz. 545, 549-50, 683 P.2d 744, 748-49 (App. 1983). Because these two statutes are not ambiguous, the rule of lenity has no application here. *See State v. Munoz*, 224 Ariz. 146, ¶ 8, 228 P.3d 138, 140 (App. 2010) (rule of lenity is rule of statutory construction that applies where statute remains susceptible to more than one interpretation after analysis).

¶8 Moreover, to the extent Mailloux argues he “could have just as easily been charged” with unlawful use rather than theft of means of transportation, because he did not challenge the indictment in the trial court, he has waived the opportunity to do so on appeal. *See* Ariz. R. Crim. P. 13.5(e) (defects in charging document must be raised in accordance with Rule 16 pretrial motion procedure); Ariz. R. Crim. P. 16.1(a) (Rule 16 governs pretrial motions); *State v. Fullem*, 185 Ariz. 134, 136, 912 P.2d 1363, 1365 (App. 1995) (defendant waived challenge to indictment by failing to object in trial court); *see also State v. Weiner*, 126 Ariz. 454, 456, 616 P.2d 914, 916 (App. 1980) (“[I]f the two statutes do not contain the same elements, the legislature is presumed not to have precluded the state from prosecuting under either at the state’s option.”). Finally, because Mailloux’s charge under § 13-1814(A)(1) (“intent to permanently deprive the person of

the means of transportation”) was dismissed, we do not address his arguments related to that subsection of the statute.

¶9 Accordingly, the conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge